Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WINFRED F. NICHOLSON,

Petitioner,

v.

UNITED STATES OF AMERICA
FOR THE INTERNAL REVENUE SERVICE,
DEPARTMENT OF THE TREASURY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Fourth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

1. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held that no federal question was presented to the District Court for jurisdiction, even though Petitioner's complaint does establish the Court's jurisdiction under 28 U.S.C. section 1346(a)(1) and 26 U.S.C. section 7422(a)?

2. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held that the Petitioner's complaint was barred under the Anti-Injunction, even though the Petitioner was no longer under the collection process and had fully satisfied the income tax assessment amount, on September 18, 1998?

3. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held that the Petitioner's refund claim is without merit for failing to state a claim, even though the Petitioner complaint seeks refund of taxes erroneously assessed and collected under Title 26 U.S.C. section 7422(a)?

4. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held the Respondents had the authority to assess all taxes under 26 U.S.C. section 6201(a), even though Respondents had no liability including enforcement statutes or regulations under Title 26 CFR applicable for the Individual Income Tax Return?

5. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held that the Petitioner's complaint was barred under doctrine of sovereign immunity, without the United States' consent, even though United States expressly consented to be sued, on October 2, 1997?

QUESTIONS PRESENTED – Continued

6. Was the Fourth Circuit in error, under the Fourth, Fifth and Fourteenth Amendments when it held that the Petitioner failed to cite a statute that waived the United States' sovereign immunity, even though Petitioner's complaint cite a waiver for damages, under Title 26 CFR section 301.7433-1(e)(d)?

7. If the Petitioner was no longer liable for the income/excise tax under alcohol, tobacco and firearms statutes, then what particular tax is he still liable for under Title 26 U.S.C.?

   (a) Was it applicable under the Anti-Injunction Act to bar a refund suit, when the Petitioner alleged that the assessment was erroneous and he was no longer liable for the income/excise tax under Internal Revenue Code section 5201?

   (b) Was it lawful for the Respondents to bypass their authority under Title 26, in order to enforce tax collection under Title 27?

   (c) How is the Petitioner able to receive a refund, when he is no longer liable for filing a tax return?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

BACKGROUND 3

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE WRIT 8

I. The decision below is in conflict with *Bothke v. Fluor Engineer and Constructions, Inc.*, 713 F.2d 1405 (1983) as to the existence of exigent liable for the tax when ex parte deprivation of seized property is at issue.

II. The Fourth Circuit has so far departed from this Court's mandate in Walter W. Flora v. United States of America, 362 U.S. 145; 80 S. Ct. 630, 646, 647; 4 L.Ed.2d 623 (1960) for reason of obvious departure from the accepted rule of law.

III. In granting of this instant Petition will provide this Court with a vehicle necessary to settle a significant conflict among the circuit courts as to the appropriate remedy available to claimant, when the Respondents seized property by misapplication of statutes together with regulation in violation of due process rights established by the Court.

STATUTORY WAIVER OF SOVEREIGN IMMUNITY 12

TABLE OF CONTENTS – Continued

Page

CONCLUSION 28

APPENDIX

UNITED STATES COURT of Appeals, Fourth Circuit Decision (Filed September 27, 2000) .....App. 1

District Court Memorandum (Filed June 1, 2000).....App. 3

District Court Order (Filed June 1, 2000).....App. 5

Fourth Circuit Court of Appeals Order denying rehearing (Filed December 4, 2000) .....App. 7

TABLE OF AUTHORITIES

Page

CASES

Bothke v. Fluor Engineers and Constructions, Inc., 713 F.2d 1405 (9th Cir. 1983).....9, 26

California Bankers Assn. v. Schultz, 416 U.S. 21 (1974).....18

Encohs v. Williams Package & Navigation Co., 370 U.S. 1, 8 L. Ed. 2d 297 (1962).....25, 26, 27

Gilbert T. Gonsalves v. IRS., 975 F.2d 13 (1st Cir. 1992).....11, 14

Long v. Rasmussen, 281 F.2d 236 (9th Cir. [D. Mont.] 1922).....23, 27

Magnone v. United States, 902 F.2d 192 (2nd Cir. 1990).....12, 13

McMillen v. U.S. Dept. of the Treasury, 960 F.2d 188 (1st Cir. 1991).....12

Robinson v. United States, 920 F.2d 1157 (3rd Cir. 1990).....11

United States v. Mersky, 361 U.S. 431 (1961).....18

Walter W. Flora v. United States of America, 362 U.S. 145; 80 S.Ct. 630; 4 L. Ed. 2d 623 (1960)...9, 10, 11, 15

STATUTES

26 U.S.C. sections 5201(a) & 6501(a)..... *passim*

26 U.S.C. sections 6015(e) & 7421(a).....21, 26

26 U.S.C. section 6201(a).....14, 15, 18, 19, 20, 22

26 U.S.C. section 6201(a)(1).....21

26 U.S.C. section 6654(e)(2)(A)(B)(C).....19

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. section 7421 ..... 21, 25

26 U.S.C. section 7422 ..... 1, 10, 13, 20

26 U.S.C. sections 7422(a) & 7433(a)..... *passim*

26 U.S.C. section 7433(d) & (e)..... 20

26 U.S.C. section 7805 15

26 U.S.C. section 7805(a)..... 6, 14, 17

28 U.S.C. section 1254(1)..... 1

28 U.S.C. section 1291 1

28 U.S.C. section 1331 1

28 U.S.C. section 1346(a)(1) 1, 5, 11, 12, 28

REGULATIONS

Title 26 CFR section 301.6001-1 15

Title 26 CFR section 301.6011-1 15

Title 26 CFR section 301.6201-1 ..... 14, 15, 24

Title 26 CFR section 301.6301-1 ..... 14, 15, 24

Title 26 CFR section 301.6331-1 ..... 14, 15, 24

Title 26 CFR section 301.7433-1(a)..... 5, 13

Title 26 CFR section 301.7433-1(d)(e) 26

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Winfred F. Nicholson, respectfully prays that a writ of certiorari be issued to review the opinions and orders of the Fourth Circuit Court of Appeals, quashing orders directing entry of judgment for Respondents, vacating and remanding the cause with instructions to proceed to trial for refund of taxes and damages.

OPINIONS AND ORDERS BELOW

Jurisdiction for the District Court of Maryland was under 28 U.S.C. section 1331, 1346 and 26 U.S.C. section 7422, and the date of the Fourth Circuit judgment for which review is sought was on October 24, 2000. The date of denial for rehearing en banc by the Fourth Circuit was December 4, 2000. The jurisdiction of the Fourth Circuit was under 28 U.S.C. section 1291 in that the appeal originated from a final order of the United States District Court of Maryland.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1254(1)

(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution provisions involved are the First, Fourth, Fifth, and Fourteenth Amendments:

U.S. Const., Amend. I "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const., Amend. IV "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Amend. V "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend. XIV "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

BACKGROUND

The Internal Revenue Service and the Department of the Treasury had no enforcement statutes or regulations applicable to Individual Income Tax, but forced the Petitioner under distraint by lien and levy from May 23, 1986 through December 18, 1998, under [Subtitle E of Title 26 and Title 27]. The Respondents seized property without enforcement regulation violating Petitioner's Fourth Amendment right to privacy secured. Petitioner believes filing a tax return also violates his Fifth Amendment right to self-incrimination. On May 19, 1986, Petitioner filed affidavit of Revocation and Rescission with the Secretary of the Treasury Mr. James Baker, and the Court's requesting injunctive relief from liable in this case.

Petitioner's affidavit of Revocation and Rescission, establishes that in signing "Form 1040" he did not know, and had no reason to know, that there was such understatement. That said "Form 1040" contained no reference to any law or laws which would explain just exactly who is or is not subject to or liable for the income tax, nor did it contain any notice or warning to anyone that merely sending said completed "Form 1040" to the IRS would

waive my right to privacy secured by the Fourth Amendment and my right to not having to be a witness against myself secured by the Fifth Amendment to the United States Constitution, and that the "Form 1040" would in itself constitute legal evidence admissible in a court of law, that the filer is subject to the liable for the income/excise tax even though and regardless of the fact that I, as a free individual, am actually and legally not subject to or liable for any income/excise tax and have no legal duty or obligation whatsoever to complete and file a "Form 1040." On February 17, 1993, Petitioner received correspondence from the Secretary of the Treasury delegated officer certifying that he was no longer liable for filing a tax return. Congress has provided exceptions to exemption, in certain cases under 26 U.S.C. of the IRS-Code.

On February 14, 1989 Petitioner requested copies of his IRS transcripts under the Freedom of Information Act, which revealed that "assessment records" were based upon a liability for income/excise tax under (A.F.T.) statutes. Based upon this evidence the Petitioner was forced into assessment and collection, through lien and levy, under (A.F.T.) statutes and regulations. Respondents continued to hold the Petitioner liable for income/excise tax under 26 U.S.C. section 5201(a), which involves conducting business through the operations of distilled spirits from May 30, 1986, through December 18, 1998.

Petitioner believes that he was never liable for the income/excise tax under the Internal Revenue Code, section 5201, as a sovereign citizen and a non-taxpayer as it relates to alcohol, tobacco, and firearms. Petitioner never engaged in the distribution of such products or earned

income from sources within, or from some activity effectively connected with, the areas of sovereign federal jurisdiction, concerning these products. On September 2, 1997, Petitioner filed administrative appeal requesting refund of all taxes withheld from May 23, 1986 through March 4, 1998, under 26 CFR 301.7433-1(a).

On October 2, 1997, Petitioner received legal notice of disallowance of claim(s) refund from the Department of the Treasury and Internal Revenue Service expressly consenting to be sued in District Court. After satisfying the collection process on December 18, 1998, Petitioner filed a second refund claim, through appeals and correspondence, exhausting his administrative remedy.

Petitioner's complaint filed on July 30, 1999, establishes:

(a) District Court of Maryland jurisdiction under 28 U.S.C. section 1346(a) and 26 U.S.C. section 7422(a).

(b) On September 2, 1997, Petitioner filed administrative remedy, requesting refund for all taxes assessed and levied, including damages.

(c) United States consented to suit, after disallowance of claim refund, on October 2, 1997.

(d) On December 18, 1998, Petitioner fully satisfied the income tax assessment.

STATEMENT OF THE CASE

On July 30, 1999, Petitioner filed amended complaint seeking refund of all taxes assessed and withheld from May 23, 1986 through March 4, 1998, in the amount of

$204,546.68 including $10 million in damages, resulting from irreparable injury. Petitioner's complaint substituted the United States as the defendant for unlawful actions taken by Internal Revenue Service and the Department of the Treasury for which the United States has jurisdiction in this case. Petitioner's complaint contains nine counts of statutory procedural violations from May 23, 1986, through March 4, 1998, each count covering a specific period of violation, unsupported by implemented regulation. Respondents bypass their authority under Title 26, to enforce collection under Title 27, without promulgated regulation, pursuant to 26 U.S.C. section 7805(a).

Pending Civil Action WMN-99-2179, on September 29, 1999, Respondents sent a "Notice of Deficiency" to the Petitioner stating he had only 90 days in which to file a petition with the United States Tax Court, for redetermination of deficiency for years 1991, 1992, 1996 and 1997.

On December 22, 1999, Petitioner filed Civil Action WMN-99-3813, by the December 29 deadline, protecting his right to due process. The complaint was based upon no implementing regulation for the enforcement of "Notice of Deficiency" under Title 26, for the Tax Court to make a redetermination in this matter.

On October 4, 1999, United States moved for Memorandum in Support of Motion to Dismiss Civil Action WMN-99-2179. United States argued that Petitioner failed to state a claim under Rule 12(b)(6) and the complaint lacked subject matter jurisdiction under Rule 12(b)(1);

refund suit was barred under the Anti Injunctive Act; and the United States has not consented to suit.

On October 22, 1999, under Civil Action WMN-99-2179, Petitioner filed a motion in opposition to United States' Motion to Dismiss, on all nine counts, seeking refund, damages and court order for relief as requested.

On March 18, 2000, United States moved for Memorandum in Support of Motion to Dismiss Civil Action WMN-99-3813. United States argued that Petitioner failed to state a claim under Rule 12(b)(6) and the complaint lacked subject matter jurisdiction under Rule 12(b)(1); seeking relief from notice of deficiency is barred under the Anti Injunctive Act; and the United States has not consented to suit.

On April 8, 2000, under Civil action WMN-99-3813, Petitioner filed a motion in opposition to United States' Motion to Dismiss, on count one illegal Notice of Deficiency" against United States seeking refund, damages and court order for relief as requested.

On May 31, 2000, Judge William M. Nickerson issued a Memorandum and Order dismissing the Petitioner's complaints, granting both the United States' motion to dismiss in Civil Action No. WMN-99-2179 and WMN-99-813. (Appendix B and C)

On June 9, 2000, Petitioner filed his appellate brief with the Fourth Circuit. On September 27, 2000, the Fourth Circuit issued its ruling on Petitioner's appeal, holding for the Respondents. (Appendix A)

On October 31, 2000, Petitioner filed timely for a rehearing and hearing en banc.

On December 4, 2000, the Fourth Circuit ruled that Petitioner's petition(s) for rehearing was denied. (Appendix D)

REASONS FOR GRANTING THE WRIT

In rejecting Petitioner's appeal the Fourth Circuit has decided issues of law contrary to the ruling of this Court concerning his right to equal protection of the law. The Fourth Circuit's holding that the Petitioner's complaint is a collection argument under the Federal Torts Claim Act, is clearly incorrect, Petitioner was no longer under the collection process, when suit was filed on July 21, 1999. The Petitioner's complaint is a refund action, which stemmed from erroneous assessments made under 26 U.S.C. 5201(a), from May 23, 1986 through March 19, 1998. The Fourth Circuit held that judicial intervention bars permanent injunctive relief as it relates to assessment and collection of taxes. This action by the District Court and the Fourth Circuit, is in conflict with the "pay first and litigate later" rule, because the evidence shows the District Court and Fourth Circuit overlooked the fact the Petitioner is a person no longer liable for filing a tax return.

District Court of Maryland and the Fourth Circuit holding deprives Petitioner of a remedy under the judicial process after the IRS administrative appeal process for remedy was exhausted, then denied. Petitioner was also deprived of his right to due process and equal protection under the law afforded to those in other Circuits. This constitutes a conflict between the Fourth Circuit and

Bothke v. Fluor Engineers and Constructions, Inc., 713 F.2d 1405 (9th Cir. 1983). The Court stated that

> "the taxpayer must be liable for the tax. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability. For the condition precedent of liability to be met, *there must be a lawful assessment*, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *Flora v. United States*. 362 U.S. 145; 80 S.Ct. 630, 646, 647; 4 L.Ed.2d 623 (1960), the Service may assess the tax *only in certain circumstances* and in conformity *with proper procedures*." [Emphasis added]

The Appellate Court erred, because the Petitioner's complaint alleged the Respondents never used proper procedures for a lawful assessment in this case. Petitioner was never liable for the income/excise tax under (A.F.T) statutes, and the IRS's demands for payment in this case does not create a liability. Petitioner's complaint met the two most important limitations for a refund suit, which are "pay first and litigate later," and filing claim for administrative refund with the IRS establishing the District Court jurisdiction in this case. The Fourth Circuit holding constitutes a conflict between the circuits and this Court in *Walter W. Flora v. United States of America*, 362 U.S. 145; 80 S.Ct. 630, 646, 647; 4 L.Ed.2d 623 (1960). That, "correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court."

The Petitioner made full payment of the income/ excise tax levied against him, which is a jurisdictional condition precedent to maintain a refund suit in the Federal District Court. In *Flora supra, Flora* failed to discharge the entire assessment amount to maintain a tax refund suit in Federal District Court. The Fourth Circuit erred in holding the Petitioner, who followed the "pay first and litigate later" rule, and without a remedy to eviscerate the intent of the 26 U.S.C. section 7422, which was mandated by Congress in providing for refund of taxes. Due to erroneous or illegal assessment, and no suit until a claim for refund is filed with the Secretary, the Petitioner met the requirements which this Court held in *Walter W. Flora v. U. S.*, 362 U.S. 145:

> "Statutes which prohibit suits to enjoin the collection to taxes, secure such a determination prior to the payment to the tax. The *right of appeal after payment of the tax is an incomplete remedy*, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often cause great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer *to sue for the recovery of the tax after this payment*. He is *entitled to an appeal* and to a determination of his liability for the tax prior to its payment." [Emphasis added]

The Fourth Circuit is in conflict with implied construction of this Court that one need to make full payment of the income tax assessment before jurisdictional

condition precedent to maintenance a refund suit in the Federal District Court. Petitioner made full payment of assessment amount for a refund. In *Flora supra,* Flora failed to make full payment of income tax assessment, thus receiving the tacit approval by this Court that full payment of assessment amount is one of the judicial prerequisites for District Court to entertain a refund suit. The Fourth Circuit holding that the Petitioner's refund suit argument did not merit discussion, allowing the government to continue in violation of statutes and regulations mandated by Congress, to restrain the government from the very reason the law was enacted.

As a mandate by Congress that under "Taxpayer Bill of Rights" suit can be maintained if assessment was fully satisfied or legally unenforceable, including all prerequisites must be satisfied to entertain suit as a refund action pursuant to 26 U.S.C. section 7422(a) and 28 U.S.C. section 1346(a)(1). The courts in *Robinson v. United States,* 920 F.2d 1157 (3d Cir. 1990), stated "that Congress has provided an elaborate system for litigating tax claims in the Tax court before payment and in District Court and the Court of Claims for refunds. Courts have hesitated to add to the remedies provided by Internal Revenue Code." Clearly the Petitioner's suit met the "pay first and litigate later" rule for the District Court to merit discussion.

The District Court and the Appellate Court erred, as provided Civil Action WMN-99-3813 does merit discussion, based upon the evidence submitted by the Respondent challenging the "Notice of Deficiency" while under pending litigation in the District Court as provided in *Gilbert T. Gonsalves v. IRS,* 975 F.2d 13 (1st Cir. 1992). The Court stated "Taxpayers who wish to challenge the IRS'

calculation of their tax liability must file either a petition for redetermination in the Tax Court, *or refund action in the District Court under 26 U.S.C. section 7422(a).*" [Emphasis added] Clearly the Respondents had not yet obtained the Court's decision concerning the tax refund for those years, and while under litigation, placed undue hardship upon the Court in this matter. The Respondents' submitting of "Notice of Deficiency" was not yet ripe for adjudication in the Tax Court in this case.

The Court also implies in *Magnone v. United States*, 902 F.2d 192 (2nd Cir. 1990), that "a taxpayer must bring the claim for refund to the IRS as a prerequisite to jurisdiction for the suit in federal court under 26 U.S.C. section 7422(a)."

STATUTORY WAIVER OF SOVEREIGN IMMUNITY

The Fourth Circuit erred in holding that the Petitioner's argument did not merit discussion allowing the government to misuse the statutes and regulations mandated by Congress to restrain the government for the very reason the laws were enacted. In *McMillen v. U.S. Dept. of Treasury*, 960 F.2d 188 (1st Cir. 1991) the Court stated "There are, of course, several statutes that do waive sovereign immunity for causes of action that concern taxation." 28 U.S.C. section 1346 (a)(1) and 26 U.S.C. section 7422(a) together these statutes authorize a taxpayer who believes that the IRS has incorrectly assessed a tax liability against him to sue for a refund. However these two statutes are subject to two important limitations. Taxpayer must first file an administrative claim for

refund. Second, taxpayer must pay assessment before going to court.

Petitioner's complaint stated that he filed a administrative appeal requesting refund of tax with Internal Revenue Service, which met the prerequisites for the District Court to entertain a refund suit. In *Magnone supra,* the Court held that "under the prior-claim rule, a taxpayer must bring the claim for refund to the IRS as a prerequisite to jurisdiction for the suit in federal court. 26 U.S.C. section 7422(a)." The Fourth Circuit holding also deprives the Petitioner of a remedy, including due process and equal protection under the First and Fourteenth Amendments, afforded to those in other Circuits which constitutes a conflict in this Court. The Respondents' enforcement of assessments was excessive and unwarranted under Title 26 CFR without implementing enforcement regulation, which provides for damages in this case and waiver of sovereign immunity under Title 26 CFR section 301-7433-1(a) as follows:

> (a) If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, *disregards any provision of this title, or any regulation* promulgated under this title, such taxpayer may bring a *civil action for damages against the United States* in a *district court* of the United States. [Emphasis added]

The Fourth Circuit erred, in holding that the Petitioner's complaint failed to state a claim, even though the Petitioner stated he filed administrative refund claim with the IRS under Title 26 CFR section 301-7433-1(a),

based upon actions taken by the IRS under 26 U.S.C. section 7422 in this case. In *Gilbert T. Gonsalver v I.R.S.*, 975 F.2d 13 (1st Cir. 1992), the court stated that Congress enacted 26 U.S.C. section 7433 as part of the "Taxpayer Bill of Rights". This statute was intended to give "taxpayers a specific right to bring an action against the government for damages sustained due to unreasonable actions taken by an IRS employee." The Petitioner met the prerequisites for the District Court to entertain this refund suit.

The Fourth Circuit and the District Court erred in holding that the materials presented in the Respondents' defense was adequate, even through the evidence shows intentional disregard for Title 26 section 7433(a). The Respondents argued that the Parallel Table in the C.F.R., is merely a tool provided by the publisher of the C.F.R., which the federal agencies have predicated as their regulations for the Internal Revenue Code. The Respondents contend their authority governing Title 26 section 6201(a) does authorize the IRS to assess and collect all taxes imposed by the IRS Code. The Respondents also contend that section 7805(a) of the IRS-Code provides the Secretary with prescribed regulations for the enforcement of the Code pursuant to section 301.6201-1 regarding assessment authority, 301.6301-1 regarding collection authority, and 301.6331-1 regarding authority to levy.

The Appellate Court erred, in holding that the materials presented in the Respondents' defense was adequate, when the material failed to met the congressional mandate for these promulgation regulations, and does not provide a prerequisite for the enforcement of each and every provision of the Internal Revenue Code. These

regulations commencing with the number 301 are purely procedural and do not relate to the specific tax in this case. In fact, sections 301.6201-1 regarding assessment authority, 301.6301-1 regarding collection authority, and 301.6331-1 regarding levy refer to the regulation for the "particular tax" under 26 CFR section 301.6001-1 and 301.6011-1, which are similarly under Title 27 CFR, concerning only administrative procedures, for alcohol, tobacco, and firearms. Most enforcement statutes such as lien and levy are under implementing regulations, which apply to alcohol, tobacco, and firearms, but there is no enforcement regulation applicable for the so-called Individual Income Tax under [Part 1 of 26 CFR.] This argument by the Respondent is incorrect, because there is no such regulation that supports their enforcement of lien and levy in this case that apply to A.F.T. statutes for excise/tax which are unenforceable under the Individual Income Tax, as in *Flora, supra,* concerning voluntary compliance. The Secretary never promulgated regulation in regard to enforcement of 6201(a), under 26 U.S.C. section 7805. The Respondents had no power to assess or collect taxes, as a matter of congressional mandate in this case.

Respondents misused their statutory authority under the Parallel Table of Authorities while lacking enforcement regulation under Title 26, and placing the Petitioner under distraint for liability. As a result the Petitioner's complaint stated that he suffer irreparable injury based upon the actions taken by the Respondents which the Appellate Court has overlooked this important fact in the case.

District Court and Fourth Circuit erred, in holding that the Respondents' suit did not merit discussion even though the Respondents bypass their enforcement authority under Title 26 Code of Federal Regulations (CFR) index and finding Aids-Parallel Table of Authorities. The published regulations are mandated by Congress to restrain the government from the very reason the laws were enacted.

Internal Revenue Service's authority is proven by Code of Federal Regulations (CFR) Index of Finding Aids, which lists the implementing regulations for the statutes of the United States Codes, and noticed in the Federal Register which is required publication as to rules and regulations applicable to persons within government agencies. The CFR Index and Finding Aids Table 1, Parallel Table of Authorities and Rules, for Subtitle F of Title 26 (Procedure and Administration, sections 6011-7873) show that most of the implementing regulations for statutes subtitle of Title 26 are in the CFR of Title 27, which applies to alcohol, tobacco and firearms. (See Chart) as follows:

26 U.S.C.	Description	Enforcement Regulation
5201	Regulation of Operations	27 CFR Part 19, 251
6020	Returns Prepared by the Secretary	27 CFR Part 70, 53
6201	Assessment Authority	27 CFR Part 70
6203	Method of Assessment	27 CFR Part 70
6212	Notice of Deficiency	NO REGULATION
6215	Assessment of Deficiency found by Tax Court	NO REGULATION
6301	Collection Authority	27 CFR Part 70, 24
6303	Notice and Demand for Tax	27 CFR Part 70
6321	Liens for Taxes	27 CFR Part 70
6331	Levy and Distraint	27 CFR Part 70
6501	Limitations on Assessment and Collection	27 CFR Part 70
6651	Failure to File Tax Return or Pay Tax	27 CFR Part 70, 24
6671	Penalty Assessed as Tax, Person Defined	27 CFR Part 70

The Appellate Court erred, in holding that the materials presented by the Respondents was adequate even though the Parallel Table shows that the Respondents had no prescribed *enforcement authority* to make assessment, based upon this fact the Petitioner was not liable for the tax under 26 U.S.C. section 5201(a). Petitioner's complaint states that the Respondents ignored his procedural rights under the enforcement regulations. The Department of the Treasury is the enforcing agency for the Internal Revenue Code, so it is the Secretary of the Treasury who must promulgate the regulations called the Code of Federal Regulations (CFR), under 26 U.S.C. section 7805(a). In this case the Secretary never enforced the

assessment made under Title 26 section 6201(a). However, this action taken by the Respondents is in conflict with this Court's implied construction in *United States v. Mersky*, 361 U.S. 431 (1961).

> "Once promulgated . . . regulations called for by . . . statute itself, have the force of law, and violation thereof incur criminal prosecution, just as if all the details had been incorporated into the congressional language . . . , the result is that neither the statute nor the regulation are complete without the other and *only together* do they have any force. In effect . . . the construction of one necessarily involves the construction of the other." [Emphasis added]

This Court has established that the statutory authority of law in the Internal Revenue Code is dependent upon the regulations promulgated by the Secretary. Based upon this fact the Petitioner had no liability for the tax under 26 U.S.C. section 5201(a), and the Respondents had no authority to assess the tax under 6201(a), and no regulation for enforcement under Title 26. Furthermore, without enforcement authority the Respondents are not within compliance with this Court's implied constructions in *California Bankers Assn. v. Schultz*, 416 U.S. 21, 26 (1974)

> " . . . the statute is not self executing, and were the Secretary to take no action whatever under his authority to promulgate regulations there would be no possibility of criminal or civil sanctions against anyone; . . . we think it important to note the Act's civil and criminal penalties attach only upon the violation of regulations promulgated by the Secretary; if the Secretary were to do nothing the act itself would *impose no penalties on anyone* . . . ; . . . the Government

> urges that since only those who violate these regulations may incur civil or criminal penalties; it is the actual regulations issued by the Secretary, and not the broad *authorizing language* of the statute which is to be tested against the standards of the Fourth Amendment and when so tested are valid." (Emphasis added.)

The District Court and the Appellate Court erred, because the Respondents imposed excessive penalties based upon the authorizing language for assessments made under 6201(a), which were excessive and not warranted under 26 U.S.C. section 6654(e)(2)(A)(B)(C) as follows:

> 2. Where no tax liability for preceding taxable year.
>
> No addition to tax shall be imposed under subsection (a) for any taxable year if –
>
> (A) the preceding taxable year was a taxable year of 12 months,
>
> (B) the individual did not have any liability for tax for the preceding taxable year and
>
> (C) the individual was a citizen or resident of the United States throughout the preceding taxable year.

The Respondents' actions were not in compliance with this congressional mandate, because the Petitioner's complaint stated that the tax assessment penalties were excessive and based upon a liability under 26 U.S.C. Section 5201(a).

District Court and Appellate Court erred, in holding that the statutory remedy, preventing redress for refund

under the Fourth Amendment relating to seizure of property through excessive tax penalties. Petitioner's complaint filed on July 30, 1999, requested refund of taxes erroneously assessed and withheld under administrative appeal process under 26 U.S.C. section 7422 provides as follows:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard.* [Emphasis added]

The District Court and Fourth Court erred, in holding that Petitioner's complaint did not merit discussion, allowing the Respondents to bypass their statutory requirement mandated by Congress to restrain the misuse of the federal law. The Petitioner's complaint stated that he filed administrative remedy in accordance with 26 U.S.C. section 7433(d) & (e). Petitioner believed that he was never liable for the income excise tax, but compliance with the statutory requirements as specifically set forth under the IRS-Code by fully satisfying the income/excise assessment. Respondents argued that 26 U.S.C. section 6201(a) of the Internal Revenue Code authorizes the Secretary to make assessment of all taxes, true, but the statute does not authorize enforcement of this assessment under Title 26 CFR which is only applicable to the Individual Income Tax Return. Petitioner had no statutory liability under 26 U.S.C. Section 5201(a), and without

"implementing regulation" by the Secretary the assessment is unenforceable under 6201(a)(1) provides, in part, as follows:

> Taxes shown on return. The Secretary shall assess all taxes *determined by the taxpayer* or by the Secretary as to which returns or list are made under this title. (Emphasis added.)

The "assessment records" revealed that the Respondents made assessments without tax returns. The evidence also shows the Petitioner was not liable for the tax or required to file a tax return, based upon his affidavit of Revocation and Rescission filed pursuant to 26 U.S.C. section 6015(e), which is the statutory exception in this case concerning section 7421(a). The District Court and the Fourth Court erred, when it held that the Court's intervention would interfere with the assessment and collection of tax.

Under Freedom of Information Act copies of the Petitioner's "Individual Master File" (IMF) "assessment records" revealed a liability for tax under section 5201(a), pertaining to (Subchapter C-Operation of Distilled Spirits Plants) as follows:

> Regulation of operations.
>
> (a) In general. Proprietors of distilled spirits plants shall conduct all operations authorized to be conducted on the premises of such plants under such regulations as the Secretary shall prescribe.

Appellate erred in holding that the Petitioner was liable for tax under 26 U.S.C. section 5201(a) as shown on assessment (IMF) records. Petitioner never engaged in the

sales of alcohol, tobacco or firearms, making himself liable for such excise tax. Respondents argued that 26 U.S.C. section 6201(a) authorize the Secretary to make assessments of all taxes, but there is no regulation that authorize the enforcement of such assessment under Title 26. United States contends the Department of the Treasury had authority to enforce collection under Title 26, but only in cases where individuals failed to pay the tax, after self-assessment under voluntary compliance. The Respondents used 26 U.S.C. section 5201(a) to establish Petitioner's liability, which allowed them to make assessment under 26 U.S.C. section 6201(a), and enforce collection under Title 27 Part 251. Petitioner's "assessment records" (IMF) also revealed that the Department of the Treasury used Title 26 U.S.C. section 6501(a) to make limitation on assessment and collection for the tax under 5201(a) through enforcement regulations, which relates to (A.F.T.) statutes under Title 27 Part 70. Governments' response to the Petitioner's refund claim "Legal Notice" (Exhibit B) disallowance of claim refund and consent to sue.

> "showing and overpayment, more than 3 years after the date it was due. The law states you must file your return within 3 years from its due date in order to be eligible for a refund or credit of overpaid taxes reported on that return. We consider withheld tax, estimated tax, or earned income credit, shown as credits on a return, as paid on the due date of the return. Generally, we consider a claim late if it was filed after the tax was paid. The Appeals Office can't change the amount of time which is allowed by law to file a claim for refund or credit. Reasonable cause or similar explanations can't change the time limits

> set by the law. If you want to sue to recover tax, penalties, or other amounts, *you may file a lawsuit with the United States District Court.*" [Emphasis added]

The District Court and the Fourth Circuit erred, in holding that there is no delicate balance between voluntary and mandatory, under Internal Revenue Code. Persons who are required to file a tax return to receive a refund, but individual not required to file a tax return are subject to two sets of apparently conflicting federal law. By the letter of the law as specifically set forth by Congress, one of those two requirements apply voluntarily or mandatorily which creates a dilemma which is in conflict with the Circuit courts in *Long v. Rasmussen*, 281 F.2d 236, 238 (9th Cir. [D. Mont.] 1922). The Court stated

> "the revenue laws are a code or system in regulation of tax assessments and collection. They relate to taxpayer, and not to non-taxpayers. The latter are without their scope. No procedure is prescribed for non-taxpayers, and no attempt is made to annul any of their rights and *remedies in due course of law*. With them Congress does not assume to deal, and they are neither the subject nor the object of the revenue laws." [Emphasis added]

The Circuit held a different interpretation of the word "Congressional mandate" concerning remedy in this case as it relates to the Petitioner. The Appellate Court erred, because the Petitioner received injunctive relief from liability for the "particular tax," after filing his affidavit with the Secretary of the Treasury. Based upon this fact, there are no procedures prescribed remedy under the Internal Revenue Code for the Petitioner in this

case. For this reason the Petitioner's complaints seek permanent injunctive relief from the District Court in the form of a "Court Order", stopping the continuing threats of lien and levy as filed under Civil Action WMN-99-3813. Petitioner's right to bring civil action against the United States for refund and damages are due to irreparable injury suffered for unreasonable actions taken by Department of the Treasury and its employees, which falls within the provision of IRC Sections 7433(a) and 7422(a).

The burden is on the Respondents to demonstrate what "enforcement regulation" was used to implement the execution of lien, levy, in this case. Not only have the Respondents failed to meet the burden of proof as to what regulation was used to enforce the tax under Title 26 CFR. Petitioner's complaint alleged that the government lacked enforcement authority, which constitutes a violation of Petitioner's Fourth Amendment right under United States Constitution. The Respondents rely upon their "enforcement regulations" under sections 301.6201-1, 301.6301-1, and 301.6331-1, which Respondents contend authorized the enforcement of IRS-Code. Those regulations commencing with the number 301 are purely procedural and do not relate to the specific tax, but refer to (A.F.T.) regulations for the "particular tax" under Title 27 CFR Part 70 concern only administrative procedures.

Furthermore, enforcement actions under lien and levy statutes are implementing regulations, which apply to alcohol, tobacco, and firearms (Part 70 of 27 CFR), there are none for the so-called Individual Income Tax (Part 1 of 26 CFR). The District Court erred, without

statutory liability the Petitioner's property was erroneously assessed for excise tax under section 5201(a) and illegally collected under Title 27. As citizen of the United States the Petitioner has the right to deal with an honest and forthright government, clearly a government that follows the law, as well as enforcing it. But yet both the District Court and Appellate Court chose to overlook the evidence in this case (Appendix A). There is a very delicate balance required between non-taxpayer versus liability, which is the subject of two sets of apparently conflicting federal laws.

This Court has recognized the judicial interference with the expeditious collection of taxes, while leaving the determination of legal challenges to the tax involved, which Congress has designed as the judicial exception under Section 7421. District Court and Fourth Circuit erred, under the Anti-Injunction Act. This Court has recognized a narrow, judicial exception to Section 7421, which applies to this case. In *Enochs v. Williams Package & Navigation Co.*, 370 U.S. 1, 8 L.Ed.2d 297 (1962). This Court stated that

> "the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it in the time of suit. Only if it is then apparent that, under the most liberal view of the law and *the facts*, the United States cannot establish its claim may the suit for an injunction be maintained." [Emphasis added]

District Court and Fourth Circuit erred by overlooking the Petitioner's complaint, which provides facts and evidence as followed:

(1) IRS's 2358(C) letter stated Petitioner was "no longer liable" for the tax. (Exhibit A)

(2) IRS's assessment records executed under Title 27 (A.F.T.) enforcement statutes. (Exhibit A)

(3) IRS's 105(C) letter of disallowance of refund and consent to sue the United States. (Exhibit B)

(4) Administrative appeal requesting refund and damages, under 26 CFR 301.7433-1 (d)(e). (Exhibit C)

The District Court erred, by holding that the Court lacked subject matter jurisdiction over Petitioner's suit to the extent he sought permanent injunctive relief from assessment and collection of tax. The District Court's and the Appellate Court's holding is in conflict with this Court concerning the Petitioner's procedural right to due process, and equal protection under the law, pursuant to section 6015(e), which is the exception in this case, under 26 U.S.C. section 7241 of the Anti-Injunction Act.

However, such action, under section 6015(e) is the judicial exception in this case under Section 7421(a) commonly referred to as the Anti-Injunction Act under the Internal Revenue Code. Section 6015(e) provides the statutory exception in this case, which is pertinent here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . " *Enochs supra* "violation of taxpayer's procedural right is the exception to Anti-Injunction Act." In *Bothke v. Flour Engineers and Constructors, Inc.*, 713 F.2d 1405 (9th Cir. 1983).

Accordingly, the District Court erred, holding that Petitioner's suit was barred by section 7421(a), because

the court lacked subject matter jurisdiction. The statutory exception to the Anti-Injunction Act, this Court has recognized a limited judicial exception to the prohibition contained in the statute. An injunction may be issued where the taxpayer demonstrates (1) that "under no circumstances could the Government ultimately prevail on the merits of its claim," and (2) that "equity jurisdiction otherwise exists." Petitioner satisfied the first prong of the *Williams Packing test*, the taxpayer must demonstrate that "under the most liberal view of the law and the facts, the United States cannot establish its claim." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. at 7. To meet the second prong of the Williams Packing test, the taxpayer must demonstrate that there are "special circumstances attending a threatened injury . . . bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. at 6. In order for an injunction to issue, the taxpayer must show that he has no remedy at law and that the denial of injunctive relief would cause him irreparable injury. Petitioner had no remedy under IRS-Code as in *Long, supra,* after receiving permanent injunctive relief from the Secretary concerning liability for the particular tax, which equity jurisdiction does exist in this case. Petitioner's complaint is within the *Williams Packing* exception. This Court has recognized that judicial exception to the Anti-Injunction Act because the Petitioner's Complaint has established that under no circumstances could the government ultimately prevail, because the Petitioner was no longer liable for the tax. Equity jurisdiction does exist in this case, because the Petitioner

alleged that the Respondents seized his property causing irreparable injury. There was no congressional provision for adequate legal remedy, under the IRS-Code, and failure to grant injunctive relief resulted in irreparable injury. Under no circumstances can the Respondents prevail on the merits in its defense. District Courts erred, because the United States has consent to suit for disallowance of claim refund, which is one of a corrective action on the part of this Court for reason of obvious departure from rule of law. District Court has equity jurisdiction to entertain a refund action including damages in this case.

CONCLUSION

The Fourth Circuit erred in upholding the ruling of the District Court by:

1). Holding that petitioner's complaint did not establish the District Court's jurisdiction and was thus unable to seek a remedy under 28 U.S.C. section 1346(a)(1) and 26 U.S.C. section 7422(a), contrary to another circuit and past cases before this Court.

2). Holding that Petitioner's request for refund under 26 U.S.C. section 7422(a) did not merit discussion under the Anti-Injunctive Act, as well as punitive damages, even though the evidence shows the Petitioner was not liable for the income excise tax, while claiming his Fourth, Fifth, and Fourteenth Amendment rights.

3). Sanctioning the District Court's holding that the United States did not consent to be sued, when the Internal Revenue Service and the Department of the Treasury

disallowed refund, when the issue was ripe for adjudication precisely because the United States expressly consented to suit.

4). Sanctioning the holding of the District Court's misapplication of the law and allowing the Department of the Treasury and the Internal Revenue Service to intentionally disregard any provisions of Title 26 as well as disallowance of claim refund. The issue is whether the Fourth Circuit bars any preventative remedial or equitable relief available to the Petitioner, thus depriving him of due process and equal protection of the law. The misapplication of statutes together with regulations is one of corrective action on the part of this Court for reason of obvious departure from the accepted rule of law under congressionally mandated for refund in this case.

For the reasons stated above the petition for a writ of certiorari should be granted in this case.

Respectfully submitted,

WINFRED F. NICHOLSON
Petitioner, Pro se
7541 E. Howard RD
Glen Burnie, Maryland 21060
410-590-5729

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1803

WINFRED F. NICHOLSON,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,
Internal Revenue Service, Department
of the Treasury,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. William M. Nickerson, District Judge. (CA-99-2179-WMN)

Submitted: September 21, 2000 Decided: September 27, 2000

Before WILKINS, NIEMEYER, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Winfred F. Nicholson, Appellant Pro Se. Annette Marie Wietecha, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Winfred Nicholson appeals from the district court's order dismissing his complaints in which he sought a refund of estimated tax payments, as well as punitive damages and injunctive relief. We have reviewed the records and the district court's opinion and find no reversible error. Accordingly, although we deny the government's motion for sanctions pursuant to Fed. R. App. P. 38, we affirm on the reasoning of the district court. *See Nicholson v. United States*, Nos. CA-99-2179-WMN, CA-99-3813-WMN (D. Md. June 1, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WINFRED F. NICHOLSON	:	Civil Action
v.	:	WMN-99-2179
UNITED STATES, et al.	:	

****

WINFRED F. NICHOLSON	:	Civil Action
v.	:	WMN-99-3813
UNITED STATES, et al.	:	

MEMORANDUM

(Filed June 1, 2000)

In these two related actions, Plaintiff challenges various actions taken by the Internal Revenue Service in assessing and collecting income taxes from Plaintiff. In Civil Action No. WMN-99-2179, Plaintiff seeks a refund of all estimated tax payments collected on his account from 1986 through 1998. In Civil Action No. WMN-99-3813, Plaintiff requests essentially the same relief, but limited to the years 1991 through 1998. Plaintiff takes the position in both actions that the IRS is without authority to assess income taxes. These same or related issues have been raised previously by Plaintiff in this Court. *Nicholson v. Jaecksch*, Civ. No. Y-87-766; *Nicholson v. Johnson*, Civ. No. WMN-95-3758, *dismissal aff'd*, 77 F.3d 470 (4th Cir. 1996); *Nicholson v. United States*, Civ. No. WMN-95-3758.

The Court finds that these complaints have no legal support and for the reasons stated in Defendants' motion to dismiss, the Complaints will be dismissed. The Court also notes, in addition, that the Complaints are factually unsupportable. As one of Plaintiff's grounds that he is not obliged to pay taxes, he represents that he "is a citizen living outside the Federal United States and its territories" and "has never made income derived from sources within the United States or connected with trade or business in the United States or its territory." Plaintiff's Opposition to Motion to Dismiss in Civil Action No. WMN-3813 at 11-12. Yet, on December 29, 1998, Plaintiff filed a civil action in this Court against a former employer in which Plaintiff stated that he was a "sovereign citizen and resident of the State of Maryland" and that he was employed by the defendant in Virginia from March 1995 through May 1995. *Nicholson v. Virginia Power,* Civil Action No. 98-4213, Complaint at 1-2. Plaintiff further alleged that the defendant's termination of his employment resulted in a loss of salary for the period May 18, 1995 to September 21, 1995, and he sought compensation in the sum of $94,000. *Id.* at 3. In light of these allegations, it is remarkable that Plaintiff now contends that he does not live in the United States nor has he derived income from employment in the United States.

Defendants' motions will be granted. A separate order will issue.

/s/ William M. Nickerson
William M. Nickerson
United States District Judge

Dated: May 30, 2000.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WINFRED F. NICHOLSON	:	Civil Action
v.	:	WMN-99-2179
UNITED STATES, et al.	:	

* *

WINFRED F. NICHOLSON	:	Civil Action
v.	:	WMN-99-3813
UNITED STATES, et al.	:	

ORDER

(Filed June 1, 2000)

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 30th day of May, 2000, by the United States District Court for the District of Maryland,

ORDERED:

1. That Defendants' Motion to Dismiss in Civil Action No. WMN-99-2179, Paper No. 7, is GRANTED;

2. That Defendants' Motion to Dismiss in Civil Action No. WMN-99-3813, Paper No. 5, is GRANTED;

3. That both the above captioned actions are hereby CLOSED;

4. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. p. 58; and

5. That the Clerk of the Court shall mail or transmit copies of the foregoing Memorandum and this Order to Plaintiff and all counsel of record.

/s/ William N. Nickerson
William M. Nickerson
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 4, 2000

No. 00-1803
CA-99-2179-WMN

WINFRED F. NICHOLSON

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA, Internal Revenue Service, Department of the Treasury

Defendant - Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK